

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

APR -5 2007

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2006-0385-PR
	)	DEPARTMENT B
v.	)	
	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
GENE WALTER KLINK,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

---

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20033071

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

---

Gene W. Klink

Kingman  
In Propria Persona

---

E S P I N O S A, Judge.

¶1 Following a jury trial, petitioner Gene Klink was convicted of misdemeanor driving under the influence of an intoxicant (DUI) and aggravated DUI after having committed or been convicted of two or more prior DUI violations. The trial court sentenced Klink to a presumptive, twelve-year term of imprisonment for the aggravated DUI conviction

and time served for the misdemeanor DUI conviction. On appeal, we vacated Klink's misdemeanor DUI conviction and affirmed his aggravated DUI conviction. *State v. Klink*, No. 2 CA-CR 2004-0215 (memorandum decision filed Mar. 30, 2006). Appellate counsel filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., fifty-five days after our mandate on appeal was issued, which the trial court dismissed as untimely (the "first notice"). Almost six weeks later, Klink filed a pro se notice (the "second notice") and petition (the "petition") for post-conviction relief, indicating in the notice the reasons for his untimely filing. The trial court summarily denied the second notice and petition, and this pro se petition for review followed. We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 Although not entirely clear, it appears this petition for review is directed at the trial court's denial of Klink's second post-conviction pleading rather than its dismissal of the first pleading. We note, in any event, that the trial court correctly found the first notice untimely. Rule 32.4(a) requires that a notice of post-conviction relief be filed within thirty days after the issuance of the order and mandate on appeal. It is undisputed that Klink's first notice, filed on August 16, 2006, was not filed within thirty days of the mandate on appeal, which was issued on June 22, 2006.

¶3 Rather, Klink seems to contend his filing of the second notice was excepted from the timeliness requirement of Rule 32.4(a). He contends it is timely because his claims

fall under Rule 32.1(e), (f), and (g), arguing without support, that there is newly discovered evidence, his failure to file a timely notice was without fault on his part, and there has been a significant change in the law. Rule 32.2(b) provides that an untimely notice of post-conviction relief “must set forth the substance of the specific exception and the reasons for not raising the claim in . . . a timely manner.” That rule also directs a trial court to summarily dismiss a notice “[i]f the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated . . . in a timely manner.”

*Id.*

¶4 This is exactly what the trial court did when it dismissed the second notice, which did not contain meritorious reasons supporting a late filing. Although Klink contended in the notice attached to the petition that his claims were exempt from the timeliness requirement of Rule 32.4(a), he failed to set forth either in the notice or the attached petition the meritorious reasons for having failed to file either his first or second notice in a timely manner, as Rule 32.2(b) requires. On review, he contends the rule requires solely that he *state*, rather than *argue*, the grounds for his untimeliness. However, merely listing exceptions under the rule, without more, does not satisfy the rule.

¶5 In addition, in its ruling denying the petition, the court not only found the petition untimely, but it also found the unrelated claims Klink had raised were either precluded under Rule 32.2(a) or do not fall within the scope of Rule 32. The court also found Klink’s claim of ineffective assistance of trial counsel to be without merit. Because

we find that the court correctly dismissed Klink's second notice as untimely, we do not address the additional claims on the merits. *See* Ariz. R. Crim. P. 32.2(b).

¶6 Finally, we summarily reject Klink's unsupported claim, raised for the first time in his petition for review, that the trial judge's conduct was prejudicial and that the judge should have recused himself from the case. Simply because a defendant is unhappy with a judge's ruling does not mean the judge acted inappropriately. Nor can a defendant raise a claim on review not raised below. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii).

¶7 Accordingly, although the petition for review is granted, relief is denied.

---

PHILIP G. ESPINOSA, Judge

CONCURRING:

---

PETER J. ECKERSTROM, Presiding Judge

---

J. WILLIAM BRAMMER, JR., Judge